Supreme Court, U.S.
F I L E D

97 • 499 SEP 16 1997

No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JUDITH A. FELTMANN,

Petitioner,

v.

SIEBEN, INC., d/b/a PLAZA MOTORS,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHARLES E. REIS, IV
T. MICHAEL WARD
(Counsel of Record)
MICHELE L. LARISSEY
BROWN & JAMES, P.C.
705 Olive Street
Suite 1100
St. Louis, Missouri 63101
(314) 421-3400
Counsel for Petitioner.

September 16, 1997

Washington, D.C. • THIEL PRESS • (202) 328-3286

63pp

QUESTIONS PRESENTED FOR REVIEW

1. In order to withstand an employer's motion for summary judgment or judgment as a matter of law in a discrimination action, must a plaintiff only establish a prima facie case of discrimination along with pretext, as held by the Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits; establish a prima facie case along with pretext and proof that discrimination was the real reason for the employer's actions, as held by the First, Second, Fourth and Fifth Circuits; or must plaintiff provide direct evidence of discrimination, as held by the Eighth Circuit?

2. Whether the Eighth Circuit Court of Appeals erred by misapplying the standard of review, whereby the court should not reverse a jury verdict unless there is a complete absence of probative facts to support the conclusion reached, when it reversed the jury's verdict on all five counts?

Page

TABLE OF CONTENTS

Questions Presented i

Table of Authorities v

Opinions Below 2

Jurisdiction 2

Statutes Involved In This Case 3

Statement Of The Case 3

Reasons For Granting The Writ:

I. A Conflict Exists Within The Circuits As To Whether The Establishment Of A Prima Facie Case of Discrimination Along With Pretext Is Enough For A Plaintiff In A Discrimination Action To Overcome Defendant's Motion For Summary Judgment Or Judgment As A Matter Of Law. This Case, Whereby The United States Court Of Appeals For The Eighth Circuit Reversed The Jury's Verdict On All Five Counts And Required Plaintiff To Provide Direct Evidence Of Discrimination To Overcome Such A Motion, Presents An Appropriate Case For Resolving That Question 5

A. Direct Evidence Approach 5

B. Pretext-Only Approach 10

C. Pretext-Plus Approach 14

D. Summary 16

II. The United States Court Of Appeals For The Eighth Circuit Erred When It Reversed The District Court's Judgment On All Five Counts Because It Misstated The Stand-

Page

ard For Reviewing A District Court's Denial Of A Motion For Judgment As A Matter Of Law, Neglected To Assume As Proven All Facts That Plaintiff's Evidence Tended To Prove, Did Not Resolve Conflicts In Favor Of The Non-Moving Party, And Did Not Give The Non-Moving Party The Benefit Of All Reasonable Inferences.....17

A. Background.....20

B. Initial Complaint Of Discrimination 20

C. Work Ethic Memorandum Given Only To Feltmann.....20

D. Use Of Company Demonstrator 22

E. Guest Drives 22

F. Loaning Of Cars To Customers During Snowstorm 23

G. Rich's Refusal To Allow Feltmann To Drive Front Wheel Drive Vehicle During Snowstorm While Granting Permission To Males 23

H. Probationary Notice To Feltmann In March 1993.....23

I. Regional Walk Around 24

J. Feltmann Was The Only Salesperson Required To Pay For Brochures 24

K. Other Instances Of Discrimination And Retaliation 25

1) Rich switching sale with male so Feltmann received less commission 25

2) Rich approved sales with less gross profit for males.....25

Page

3) Assistant manager would not approve customary tire switch 25

4) Not getting off telephone for Feltmann to sign orders but doing so for males 25

5) Feltmann was replaced by a male sales consultant 25

L. Fraud By Feltmann's Managers In Summer Momentum Program 26

M. Rich Was Totally Discredited At Trial 27

N. Feltmann's Claims For Sexual Discrimination 28

O. Feltmann's Claims For Retaliation 29

P. Feltmann's Claim For Wrongful Discharge 30

Conclusion 30

APPENDICES:

Appendix A – The panel decision of The United States Court of Appeals for the Eighth Circuit, reported as *Feltmann v. Sieben, Inc.*, 108 F.3d 970 (8th Cir. 1997) 1a

Appendix B – Order Denying Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* 15a

Appendix C – District Court Judgment in *Feltmann v. Sieben, Inc.*, No. 4:94CV562 SNL (E.D. Mo.) 16a

Appendix D – District Court Order pertaining to post-trial matters 18a

Page

TABLE OF AUTHORITIES

Cases:

Aka v. Washington Hosp. Ctr., 116 F.3d 876 (D.C. Cir. 1997) 14

Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994) 11

Aramburu v. The Boeing Co., 112 F.3d 1398 (10th Cir. 1997) 12

Benson v. Tocco, Inc., 113 F.3d 1203 (11th Cir. 1997) 13

Bray v. Marriott Hotels, 110 F.3d 986 (3rd Cir. 1997) 10

Burns v. AAF-McQuay, Inc., 96 F.3d 728 (4th Cir. 1996) 15

Celotex Corp. v. Catrett, 477 U.S. 316, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986) 18

Combs v. Meadowcraft, Inc., 106 F.3d 1519 (11th Cir. 1997) 13

Craik v. Minnesota State Univ. Bd., 731 F.2d 465 (8th Cir. 1984) 18

Davenport v. Riverview Gardens Sch. Dist., 30 F.3d 940 (8th Cir. 1994) 19, 20

Equal Employment Opportunity Comm'n v. Avery Dennison Corp., 104 F.3d 858 (6th Cir. 1997) 10

Equal Employment Opportunity Comm'n v. Texas Instruments, Inc., 100 F.3d 1173 (5th Cir. 1996) 16

Cases, continued: Page

Equal Employment Opportunity Comm'n v. Yenkin-Majestic Paint Corp., 112 F.3d 831 (6th Cir. 1997) 11

Feltmann v. Sieben, Inc., 108 F.3d 970 (8th Cir. 1997) 2

Fennell v. First Step Designs, Ltd., 83 F.3d 526 (1st Cir. 1996) 14

Fuentes v. Perskie, 32 F.3d 759 (3rd Cir. 1994) 10

Grimes v. Texas Dep't of Mental Health, 102 F.3d 137 (5th Cir. 1996) 16

Holt v. KMI-Continental, Inc., 95 F.3d 123 (2nd Cir. 1996) 15

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977) 6

Jackson v. Delta Special Sch. Dist., 86 F.3d 1489 (8th Cir. 1996) 30

James E. Brady & Co., Inc. v. ENO, 992 F.2d 864 (8th Cir. 1993) 18

Karazanos v. Navistar Int'l Transp. Corp., 948 F.2d 332 (7th Cir. 1991) 11

Kolstad v. American Dental Ass'n, 108 F.3d 1431 (D.C. Cir. 1997) 14

Lidge-Myrtil v. Deere & Co., 49 F.3d 1308 (8th Cir. 1995) 19, 20

Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173 (8th Cir. 1992) 6

Cases, continued: Page

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) 6

Marzec v. Marsch, 990 F.2d 393 (8th Cir. 1993) 29

Mesnick v. General Elec. Co., 950 F.2d 816 (1st Cir. 1991) 14

Mitchell v. Data Gen. Corp., 12 F.3d 1310 (4th Cir. 1993) 15

Morgan v. Hilti, Inc., 108 F.3d 1319 (10th Cir. 1997) 13

Nelson v. Boatman's Bancshares, Inc., 26 F.3d 796 (8th Cir. 1994) 7

Nelson v. J.C. Penney, Inc., 75 F.3d 343 (8th Cir. 1996) 5, 7

Nelson v. J.C. Penney, Inc., 79 F.3d 84 (8th Cir. 1996) (McMillian, J., concurring) 6, 7

Olinger v. General Heating and Cooling Co., 896 S.W.2d 43 (Mo. App. 1994) 30

Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996) 16

Robinson v. Overseas Military Sales Corp., 21 F.3d 502 (2nd Cir. 1994) 15

Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328 (8th Cir. 1996) 6, 7, 8

Ryther v. Kare 11, 108 F.3d 832 (8th Cir. 1997) ..... *passim*

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993) 5, 6, 19

Cases, continued: Page

Scaria v. Rubin, 117 F.3d 652 (2nd Cir. 1997) 15

Schnidrig v. Columbia Machine, Inc., 80 F.3d 1406 (9th Cir. 1996)..... 12

Schweiss v. Chrysler Motors Corp., 987 F.2d 548 (8th Cir. 1993)..... 30

Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061 (3rd Cir. 1996)..... 10

Strother v. Southern California Permanente Medical Group, 79 F.3d 859 (9th Cir. 1996) 12

Tuck v. Henkel Corp., 973 F.2d 371 (4th Cir. 1992)..... 15

Wolf v. Buss (Am.), Inc., 77 F.3d 914 (7th Cir. 1996) 11

Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994).....14

Statutes and Rules:

42 U.S.C. §2000e *et seq.* 3, 4

Mo.Rev.Stat. §213.010 *et seq.* 3, 4

Supreme Court Rule 13.1 2

28 U.S.C. §1254(1) 2

28 U.S.C. §1331..... 4

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JUDITH A. FELTMANN,

Petitioner,

v.

SIEBEN, INC., d/b/a PLAZA MOTORS,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Judith A. Feltmann respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on March 20, 1997, in order to resolve the conflict within the circuits on the important issue presented herein and to reverse the judgment below.

OPINIONS BELOW

The panel decision of the United States Court of Appeals for the Eighth Circuit is reported as *Feltmann v. Sieben, Inc.*, 108 F.3d 970 (8th Cir. 1997), and is attached hereto as Appendix A to this Petition. Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied on June 18, 1997; however, three judges voted to rehear the matter *en banc*. The order denying the petition for rehearing is not officially reported and is attached hereto as Appendix B.

The district court's opinion in *Feltmann v. Sieben, Inc.*, No. 4:94CV562 SNL (E.D. Mo.), was filed April 12, 1995 and is not officially reported. That opinion is attached hereto as Appendix C. The district court's opinion pertaining to post-trial matters was filed on November 16, 1995 and is not officially reported. That opinion is attached hereto as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on March 20, 1997. (*See* Appendix A). On June 18, 1997, the court of appeals denied a timely Petition for Rehearing and Suggestion for Rehearing *En Banc*. (*See* Appendix B). Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

42 U.S.C. §2000e-2 provides:

> (a) Employer Practices. It shall be an unlawful employment practice for an employer:
>
> (1) [T]o . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

42 U.S.C. §2000e-3 provides:

> (a) It shall be an unlawful employment practice for an employer to discriminate against his employees . . . because he has opposed any practice made an unlawful practice . . . .

Mo.Rev.Stat. §213.055 provides:

> 1. It shall be unlawful employment practice:
>
> (1) For an employer, because of the . . . sex . . . of any individual:
>
> (a) To . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

Mo.Rev.Stat. §213.070 provides:

> It shall be an unlawful discriminatory practice:
>
> (2) To retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter . . . .

STATEMENT OF THE CASE

Petitioner, Judith A. Feltmann ("Feltmann"), was discharged from her position as a commissioned car sales consultant with respondent, Sieben, Inc. ("Sieben"),

which is a Missouri corporation that operates a number of automobile franchises under the name "Plaza Motor Company." Feltmann filed suit in the United States District Court, Eastern District of Missouri, claiming that she was discharged in violation of Title VII, 42 U.S.C. §2000e *et seq.*, the Missouri Human Rights Act, Mo.Rev.Stat. §213.010 *et seq.*, and the Missouri common law. The United States District Court had jurisdiction to hear this matter pursuant to 28 U.S.C. §1331.

Feltmann submitted five claims to the jury: 1) sex discrimination in violation of Title VII, 2) retaliation in violation of Title VII, 3) sex discrimination in violation of Mo.Rev.Stat. §213.010 *et seq.*, 4) retaliation in violation of Mo.Rev.Stat. §213.010 *et seq.*, and 5) wrongful discharge. On May 16, 1995, a jury found in favor of Feltmann on all five counts and awarded Feltmann the sum of $112,661.00 for back pay, $20,072.29 for compensatory damages, and $25,000.00 in punitive damages on her Title VII sex discrimination claim. (*See* Appendix C).

On May 26, 1995, Sieben filed a timely Motion for Judgment as a Matter of Law, or in the alternative, Motion for a New Trial, or in the alternative, to Alter or Amend the Judgment. On November 16, 1995, after a hearing on the equitable issues, the district court denied all of Sieben's motions and awarded Feltmann front pay for a two year period in the total amount of $72,668.38, attorney's fees of $153,338.45, and costs of $14,251.87. (*See* Appendix D).

On November 22, 1995, Sieben filed a timely Notice of Appeal. On March 20, 1997, the United States Court of Appeals for the Eighth Circuit issued its opinion, reversing all five jury verdicts in favor of Feltmann. (*See* Appendix A). On June 18, 1997, the court of appeals denied plaintiff's timely Petition for Rehearing and Suggestion for Rehearing *En Banc*. (*See* Appendix B).

REASONS FOR GRANTING THE WRIT

I.

A CONFLICT EXISTS WITHIN THE CIRCUITS AS TO WHETHER THE ESTABLISHMENT OF A PRIMA FACIE CASE OF DISCRIMINATION ALONG WITH PRETEXT IS ENOUGH FOR A PLAINTIFF IN A DISCRIMINATION ACTION TO OVERCOME DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR JUDGMENT AS A MATTER OF LAW. THIS CASE, WHEREBY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT REVERSED THE JURY'S VERDICT ON ALL FIVE COUNTS AND REQUIRED PLAINTIFF TO PROVIDE DIRECT EVIDENCE OF DISCRIMINATION TO OVERCOME SUCH A MOTION, PRESENTS AN APPROPRIATE CASE FOR RESOLVING THAT QUESTION.

Although the United States Supreme Court decided that plaintiff's establishment of a prima facie discrimination case plus proof of pretext is not enough to award plaintiff summary judgment or judgment as a matter of law, *see St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993), the Court has not stated whether proof of a prima facie case along with pretext is enough for plaintiff to overcome an employer's motion for summary judgment or judgment as a matter of law. The circuit courts have been asked repeatedly to decide this issue and turmoil exists among the circuits as to how it should be resolved.

A. Direct Evidence Approach.

In the case at hand, the Eighth Circuit relied on the holding in *Nelson v. J.C. Penney Inc.*, 75 F.3d 343 (8th Cir. 1996), in granting defendant's motions for judgment as a matter of law on all five counts of the complaint, thereby requiring Feltmann to provide direct

evidence of discrimination. (*See* Appendix A, p. 8a). The court mistakenly required the plaintiff to provide direct evidence of discrimination in order to overcome a motion for judgment as a matter of law in a *McDonnell Douglas* disparate treatment case. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). Case law clearly acknowledges that, due to the difficulty in discovering direct evidence of discrimination, a plaintiff may rely on direct or circumstantial evidence in establishing a disparate treatment discrimination cause of action. *See St. Mary's v. Hicks,* 509 U.S. at 524; *See also Ryther v. Kare 11,* 108 F.3d 832, 838 (8th Cir. 1997); *Rothmeier v. Investment Advisers, Inc.,* 85 F.3d 1328, 1331 (8th Cir. 1996). Moreover, the Supreme Court has stated, "the *McDonnell Douglas* formula does not require direct proof of discrimination." *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 358 n.44, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977). By requiring direct evidence of discrimination in the case at hand, the Eighth Circuit is clearly taking away the jury's function of determining the ultimate factual issue pertaining to intentional discrimination.

In concluding that Feltmann needed to establish direct evidence of discrimination, the Eighth Circuit also relied on *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 174 (8th Cir. 1992). However, the court misapplied *Lowe* because, in that case the court specifically stated, "[i]n general, a plaintiff may rebut a defendant's asserted justification either directly, or indirectly, by showing that the proffered explanation is unworthy of belief." *Id.*

In his concurring opinion of the denial of the Motion for Rehearing in *Nelson v. J.C. Penney Inc.*, 79 F.3d 84 (8th Cir. 1996), Judge McMillian discussed the confusion within the Eighth Circuit regarding the standard for

granting the employer in a Title VII action summary judgment or judgment as a matter of law. *Nelson v. J.C. Penney,* 79 F.3d at 85 (McMillian, J., concurring). The majority opinion in that case required the plaintiff to provide direct evidence of discrimination in order to overcome defendant's motion for summary judgment. *Nelson v. J.C. Penney Co.,* 75 F.3d 343, 345 (8th Cir. 1996). Judge McMillian pointed out that, though plaintiff's evidence was insufficient to overcome a motion for summary judgment, the majority opinion mistakenly required direct evidence of discrimination, which is the standard applied to reduction-in-force and mixed-motive discrimination cases, not *McDonnell Douglas* disparate treatment cases. *Nelson v. J.C. Penney,* 79 F.3d at 85 (McMillian J., concurring). In his concurrence, Judge McMillian stated that the majority opinion relied on *Nelson v. Boatmen's Bancshares, Inc.,* 26 F.3d 796 (8th Cir. 1994), a reduction-in-force case, in reaching its decision. *See* Judge McMillian's concurrence, *Nelson v. J.C. Penney,* 79 F.3d at 85. Thus, the court wrongfully applied the standard for a reduction-in-force discrimination case, which requires direct proof of discrimination, to a disparate treatment discrimination case, which can be established through direct or circumstantial evidence. *Id.*

Approximately six months after the holding in *Nelson v. J.C. Penney,* 75 F.3d 343 (8th Cir. 1996), wherein the Eighth Circuit required the plaintiff to provide direct evidence of discrimination in a *McDonnell Douglas* burden-shifting analysis case, the court contradicted itself and stated that a plaintiff may rely on either direct or circumstantial evidence to prove unlawful discrimination in such a case. *Rothmeier,* 85 F.3d at 1331. Even more recently, in the case at hand, the court ignored its holding in *Rothmeier* and again wrongfully required direct

evidence of discrimination in a *McDonnell Douglas* sex discrimination case. (*See* Appendix A, p. 8a). Thus, it is clearly evident that there is serious confusion within the Eighth Circuit as to whether the plaintiff in a *McDonnell Douglas* discrimination case must provide direct evidence of intentional discrimination in order to overcome defendant's motion for summary judgment or judgment as a matter of law.

Furthermore, the Eighth Circuit interpreted the United States Supreme Court's holding in *Hicks* to reject the pretext-only and pretext-plus approaches, discussed below, in exchange for a middle ground approach whereby the test is simply whether the plaintiff provided sufficient evidence for a reasonable factfinder to conclude that the employer intentionally discriminated against the employee. *Rothmeier,* 85 F.3d at 1334. In *Rothmeier,* the court acknowledged that its holdings regarding the requirements for a plaintiff to overcome a defendant's motion for summary judgment have not been consistent since the Supreme Court's ruling in *Hicks. Id.* at 1335. The court has held on occasion that establishment of a prima facie case along with evidence of pretext was enough to survive a defendant's motion for summary judgment while at other times the court held that the plaintiff needed to provide additional facts to establish that the employer's rationale for its actions was pretextual and the real reason for the employer's behavior was intentional discrimination. *Id.* at 1336. In *Rothmeier,* the court explained this discrepancy by interpreting *Hicks* to adopt a case-by-case, fact specific approach and stated that this is the approach taken by the Eighth Circuit. *Id.* Thus, the Eighth Circuit adopted the rule that, in order to avoid an employer's motion for summary judgment or judgment as a matter of law, the plaintiff must:

> (1) create[ ] a fact issue as to whether the employer's proffered reasons are pretextual and (2) create[ ] a reasonable inference that . . . [discrimination] was a determinative factor in the adverse employment decision.

Id. at 1336-37.

According to the court, the second prong of this test can sometimes be met without the requirement of any evidence beyond that already provided under the first prong, if the evidence proved during the prima facie case and proof of pretext is strong enough to indicate that intentional discrimination was the employer's motivating factor. *Id.* at 1337. *See also Ryther v. Kare 11,* 108 F.3d 832 (8th Cir. 1997).

In sum, it is clear from the case law that the Eighth Circuit has been inconsistent in determining what amount and kind of evidence the plaintiff must prove in a *McDonnell Douglas* discrimination case to overcome an employer's motion for summary judgment or judgment as a matter of law. Although the Eighth Circuit is the only circuit to require direct evidence of discrimination, an analysis of case law in the remaining circuits indicates that confusion and conflict exist between the circuits as to what the plaintiff is required to prove in a disparate treatment case. As seen in Part II of this section of this Petition for Writ of Certoirari, which is adopted and incorporated by reference, the Eighth Circuit demonstrates its confusion in determining what standard to apply in a *Hicks* case because, in the case at hand, it required the plaintiff not only to establish pretext, but to show discrimination through direct evidence.

B. Pretext-Only Approach.

The majority of circuits conclude that plaintiff's establishment of a prima facie case along with pretext is enough to overcome an employer's motion for summary judgment or judgment as a matter of law.

In following this "pretext-only" approach, the Third Circuit has interpreted *Hicks* to mean that:

> [T]he elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination.

Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061, 1066-67 (3rd Cir. 1996).

Thus, the court in *Sheridan* determined that:

> It followed [from Hicks] that a plaintiff may survive summary judgment (or . . . judgment as a matter of law) if the plaintiff produced sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action.

Id. at 1067.

Accord Bray v. Marriott Hotels, 110 F.3d 986 (3rd Cir. 1997); *Fuentes v. Perskie*, 32 F.3d 759 (3rd Cir. 1994).

The Sixth Circuit has similarly held that, if a plaintiff in a Title VII action proves a prima facie case, the plaintiff will survive the employer's motion for summary judgment or judgment as a matter of law. *Equal Employment Opportunity Comm'n v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997). The Sixth Circuit stated that this conclusion naturally followed since plaintiff's establishment of a prima facie case creates a rebuttable pre-

sumption that the employer must overcome by proving that its actions were for a legitimate, nondiscriminatory reason. *Id.* In *Equal Employment Opportunity Comm'n v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831 (6th Cir. 1997), the Sixth Circuit interpreted *Hicks* to reject the "pretext-plus" approach since *Hicks* stated that a plaintiff can establish intentional discrimination by proving a prima facie case along with pretext, without having to provide any additional evidence. *Yenkin-Majestic*, 112 F.3d at 835.

In following the pretext-only approach, the Seventh Circuit stated that the plaintiff in a Title VII discrimination case must only " 'provide evidence from which a rational factfinder could infer that the company lied' about its proffered reasons for his dismissal" in order to overcome a defendant's motion for summary judgment. *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994) (quoting *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990)). In *Anderson*, the Seventh Circuit noted the two different approaches being followed by the circuits, but interpreted *Hicks* to apply this pretext-only approach. *Anderson* at 1122-23. *See also Karazanos v. Navistar Int'l Transp. Corp.*, 948 F.2d 332 (7th Cir. 1991). The Seventh Circuit has also held that, where the employer provides more than one rationale for its actions, plaintiff does not necessarily have to prove that each explanation is pretextual in order to overcome defendant's motion for summary judgment. *Wolf v. Buss (Am.), Inc.*, 77 F.3d 914, 920 (7th Cir. 1996). Instead, where defendant's explanations are intertwined or one explanation is rather suspicious in nature, the plaintiff is not required to prove that each of the employer's explanations is pretextual in order to survive defendant's motion for summary judgment. *Id.*

The Ninth Circuit applies a stringent standard in considering summary judgment motions in employment discrimination cases " 'because the ultimate question is one that can only be resolved through a "searching inquiry" – one that is most appropriately conducted by the fact-finder.' " *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996) (quoting *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994) (quoting *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991))). Though the Ninth Circuit states that establishment of a prima facie case is not enough by itself to avoid a motion for summary judgment, it does provide that "a plaintiff need produce 'very little evidence of discriminatory motive to raise a genuine issue of fact' as to pretext." *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859, 870 (9th Cir. 1996), citing *Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995) (quoting *Lindahl v. Air France*, 930 F.2d 1434, 1437 (9th Cir. 1991)). According to the Ninth Circuit, the plaintiff will almost always survive an employer's motion for summary judgment in a Title VII action if the plaintiff provides some evidence, whether direct or circumstantial, beyond the presumption established by the prima facie case. *Id.* (quoting *Lam v. University of Hawaii*, 40 F.3d 1551, 1559 (9th Cir. 1994) (quoting *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991))). Also, the same evidence used to prove the prima facie case can also establish pretext. *Id.*

The Tenth Circuit has also held that plaintiff's proof of a prima facie case of discrimination plus evidence of pretext means that the case should go before the trier of fact. *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1403 (10th Cir. 1997) (citing *Jones v. Unisys Corp.*, 54 F.3d

624, 630 (10th Cir. 1995)). Furthermore, the Tenth Circuit has stated that the plaintiff does not have to prove that discriminatory reasons motivated the employer's actions in order to overcome the employer's motion for summary judgment. *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1321 (10th Cir. 1997) (citing *Randle v. City of Aurora*, 69 F.3d 441, 452 (10th Cir. 1995)). Instead, illustrating pretext is enough for plaintiff to survive defendant's motion for summary judgment. *Id.* at 1323 (citing *Randle v. City of Aurora*, 69 F.3d 441, 452 (10th Cir. 1995) (quoting *Ingels v. Thiokol Corp.*, 42 F.3d 616, 622 n.3 (10th Cir. 1994))). Any doubts regarding pretext must be resolved in plaintiff's favor when analyzing a defendant's motion for summary judgment. *Id.* at 1324.

Like the majority of other circuits, the Eleventh Circuit concluded that establishment of a prima facie case plus evidence of pretext is enough for a plaintiff to overcome a defendant's motion for summary judgment in a Title VII discrimination action. If plaintiff provides enough evidence to illustrate that a genuine issue exists as to whether defendant's explanation for its actions is true, then plaintiff must survive defendant's summary judgment action. *Benson v. Tocco, Inc.*, 113 F.3d 1203, 1207 (11th Cir. 1997). *Accord Combs v. Meadowcraft, Inc.*, 106 F.3d 1519 (11th Cir. 1997). Similarly, a defendant is not entitled to judgment as a matter of law if plaintiff demonstrates that an issue exists as to whether or not defendant's rationale is the true reason for its decision. *Combs*, 106 F.3d at 1538.

In following the pretext-only approach, the District of Columbia Circuit stated that the holding in *Hicks* requires a court to deny an employer's motion for summary judgment or judgment as a matter of law if plain-

tiff raises a genuine issue of fact as to whether or not defendant's proffered reasons for its actions are the truth. *Aka v. Washington Hosp. Ctr.*, 116 F.3d 876 (D.C. Cir. 1997). *See also Kolstad v. American Dental Ass'n*, 108 F.3d 1431 (D.C. Cir. 1997).

C. Pretext-Plus Approach.

A minority of the circuits require that, along with the establishment of a prima facie case of discrimination and proof that the employer's reasons given for its actions are unworthy of credence, the plaintiff must also prove that intentional discrimination was the real reason for the employer's actions in order to overcome an employer's motion for summary judgment or judgment as a matter of law.

According the the First Circuit:

> the plaintiff, before becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on . . . [discrimination].

Woods v. Friction Materials, Inc., 30 F.3d 255, 260 (1st Cir. 1994) (citing *Goldman v. First Nat'l Bank of Boston*, 985 F.2d 1113, 1117 (1st Cir. 1993) (additional citations omitted)).

Accord Fennell v. First Step Designs, Ltd., 83 F.3d 526 (1st Cir. 1996). Thus, a plaintiff must prove more than the falsity of the employer's proffered reasons. *Mesnick v. General Elec. Co.*, 950 F.2d 816, 824 (1st Cir. 1991). The plaintiff must:

> "elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive: . . . discrimination."

Id. (quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990)).

Following this same approach, the Second Circuit has stated that, in order to survive an employer's motion for summary judgment, a plaintiff in a Title VII discrimination action must provide sufficient evidence that the employer's proffered reasons for its actions are false and that discrimination is more likely than not the real reason for its actions. *Scaria v. Rubin*, 117 F.3d 652, 654 (2nd Cir. 1997). The plaintiff need not establish that discrimination was the only reason for the employer's actions, but instead must show, by a preponderance of the evidence, that it was a determinative factor. *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502 (2nd Cir. 1994) (citing *Levin v. Analysis & Technology, Inc.*, 960 F.2d 314, 317 (2nd Cir. 1992)). *Accord Holt v. KMI-Continental, Inc.*, 95 F.3d 123 (2nd Cir. 1996).

The Court of Appeals for the Fourth Circuit has held that a plaintiff in a Title VII action must provide either direct or circumstantial evidence "of a stated purpose to discriminate [on the basis of age] of sufficient probative force to reflect a genuine issue of material fact." *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728, 732 (4th Cir. 1996) (quoting *Equal Employment Opportunity Comm'n v. Clay Printing*, 953 F.2d 936, 941 (4th Cir. 1992) (quoting *Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988))). To establish pretext, the Fourth Circuit stated that the plaintiff must only prove that discrimination was more likely the reason for the employer's actions than the explanation given by the employer. *Tuck v. Henkel Corp.*, 973 F.2d 371, 375 (4th Cir. 1992). *See also Mitchell v. Data Gen. Corp.*, 12 F.3d 1310 (4th Cir. 1993).

The Fifth Circuit also requires that the evidence be sufficient to establish that the employer intentionally discriminated against the plaintiff in order for the plaintiff to overcome defendant's motion for summary judgment or judgment as a matter of law. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 995 (5th Cir. 1996). The plaintiff must create a fact issue as to whether or not the employer's proffered reasons for its actions are the true explanation and must create a reasonable inference that discrimination was a determinative factor in the employer's actions. *Id.* at 994. *See also Equal Employment Opportunity Comm'n v. Texas Instruments, Inc.*, 100 F.3d 1173 (5th Cir. 1996); *Grimes v. Texas Dep't of Mental Health*, 102 F.3d 137 (5th Cir. 1996).

D. Summary.

It is clear from the case law that serious confusion and discrepancy exists among the circuits, and within the Eighth Circuit, regarding the evidence required of a plaintiff in a Title VII discrimination action in order for the plaintiff to survive an employer's motion for summary judgment or judgment as a matter of law. Consequently, writ of certiorari is necessary to end this confusion and to establish a consistent standard for reviewing a defendant's motion for summary judgment or judgment as a matter of law in a Title VII action, in order to ensure that Title VII is properly applied and uniformly enforced throughout the courts.

II.

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ERRED WHEN IT REVERSED THE DISTRICT COURT'S JUDGMENT ON ALL FIVE COUNTS BECAUSE IT MISSTATED THE STANDARD FOR REVIEWING A DISTRICT COURT'S DENIAL OF A MOTION FOR JUDGMENT AS A MATTER OF LAW, NEGLECTED TO ASSUME AS PROVEN ALL FACTS THAT PLAINTIFF'S EVIDENCE TENDED TO PROVE, DID NOT RESOLVE CONFLICTS IN FAVOR OF THE NON-MOVING PARTY, AND DID NOT GIVE THE NON-MOVING PARTY THE BENEFIT OF ALL REASONABLE INFERENCES.

The Eighth Circuit Court of Appeals did not follow the appropriate standard of review when it reversed the jury's verdict. A court should only reverse a jury's verdict "when there is a complete absence of probative facts to support the conclusion reached." *Ryther,* 108 F.3d at 845. In completely overturning the district court's judgment, the Eighth Circuit did not correctly state the standard of review and blatantly ignored the standard it enunciated. The Court made the following statement regarding the standard of review:

> We review de novo a district court's denial of a motion for judgment as a matter of law, applying the same standard used by that court. *See Trition Corp. v. Hardrives, Inc.,* 85 F.3d 343, 345 (8th Cir. 1996). We must consider the evidence in the light most favorable to Feltmann, assume that all conflicts were resolved in her favor, give her the benefit of all reasonable inferences, and then deny the motion for judgment as a matter of law if reasonable persons could differ regarding the conclusions to be drawn from that evidence. See e.g. *Ryther v. KARE 11,* 108 F.3d 832, 1997 U.S. App. LEXIS 3897, No. 94-3622, *slip op.* at 25-26 (8th Cir. Mar 6, 1997) (*en banc*); *Kientzy v. McDonnell*

Douglas Corp., 990 F.2d 1051, 1056 (8th Cir. 1993).

See Appendix A, p. 7a.

However, in addition to the considerations stated above, the court must also assume as proven all facts that plaintiff's evidence tended to prove. *Ryther,* 108 F.3d at 844. The court of appeals must review all facts, assuming all facts in the nonmoving party's favor are true which the evidence tends to prove, resolving any conflicts in favor of the non-moving party, and giving the non-moving party benefit of all reasonable inferences. *James E. Brady & Co., Inc. v. ENO,* 992 F.2d 864, 869 (8th Cir. 1993). *See also Celotex Corp. v. Catrett,* 477 U.S. 316, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986). By reversing the jury verdict in *Feltmann,* the court of appeals clearly did not follow this standard because substantial evidence was proven to show that Sieben intentionally discriminated against plaintiff. The jury's verdict for Feltmann on all five counts is indicative of the strength of Feltmann's evidence.

In this case, the Eighth Circuit isolated each piece of evidence establishing discrimination, and determined that individual pieces of evidence, standing alone, did not support a finding of discrimination instead of looking at the cumulative evidence as a whole. In reviewing this case on appeal, the court should be concerned with "whether the overall evidence supports a reasonable inference" that sex motivated Sieben's termination of Feltmann. *Ryther,* 108 F.3d at 840 (citing *Hicks,* 509 U.S. at 511). Even though no one factor may be determinative, the court must look at the cumulative effect of the evidence. *Craik v. Minnesota State Univ. Bd.,* 731 F.2d 465, 483 (8th Cir. 1984). Thus, the

Eighth Circuit failed to review the record as a whole in determining whether discrimination existed.

After completely emasculating the evidence proved by Feltmann, the Eighth Circuit re-evaluated the unrefuted evidence, and discounted Feltmann's own testimony in multiple areas as being "vague and conclusory claims" that were insufficient to support a claim of disparate treatment, citing *Lidge-Myrtil,* 49 F.3d 1308, 1311-12 (8th Cir. 1995), and *Davenport v. Riverview Gardens Sch. Dist.,* 30 F.3d 940, 945 (8th Cir. 1994). However, the Eighth Circuit erred in relying on *Lidge-Myrtil* because that case involved the grant of a summary judgment motion where the plaintiff attempted to introduce the hearsay statement of an unidentified person for the first time in her appellate brief. In addition, the court in *Davenport,* another case reviewing the granting of summary judgment, stated:

> [I]n light of plaintiff's *failure to adduce any independent evidence* to substantiate his disparate treatment claim, we agree with the district court that there is no genuine issue of fact on the issue of pretext and the ultimate issue of intentional discrimination.

Davenport, 30 F.3d at 945 (emphasis added).

The cases of *Lidge-Myrtil* and *Davenport* are inapposite because Feltmann did produce specific examples of discrimination, which was not done in either of those cases. If the evidence presented at trial is reviewed in accordance with *Ryther* and *Hicks,* the evidence not only is sufficient to permit an inference of intentional discrimination, but it also clearly supports the jury's finding of discrimination. It is essential that

the evidence at trial be reviewed as a whole to determine if it supports a reasonable inference of discrimination. The evidence at trial was as follows:

A. Background.

Sieben, Inc. operates an automobile dealership in St. Louis County, known as "Plaza Motor Company," with separate automobile franchises, including Infiniti (T. 5:12 and 78).[1] Feltmann was hired by Bob Rich, the former sales manager at Plaza Infiniti, in September 1991 as a full time sales consultant of Infiniti automobiles. (T. 3:58-59). Feltmann was the first female Rich hired since 1982. (T. 2:54). The other sales consultants at Plaza Infiniti in September of 1991 were all males, Rick Buetel, Casey Jones, Stuart Ziglin, Mike Barnstead, and Scott Brenner. (T. 3:60).

B. Initial Complaint Of Discrimination.

In November 1992, Feltmann learned from her co-worker, Barnstead, that another employee of Plaza Motors who worked in a different franchise, Gordon Anzalone, allegedly called Feltmann a "f - - - - - - c - - -." (T. 3:92-93). Anzalone was talked to by management, and Feltmann was told that if Anzalone made any similar comments, she should report it. (T. 3:97-98).

C. Work Ethic Memorandum Given Only To Feltmann.

On January 4, 1993, Rich sent Feltmann a memo concerning her "work ethic." (T. 3:121). From when

---

[1]The notation "T. 5:12 and 78" denotes pages 12 and 78 of Volume Five of the Trial Transcript.

Feltmann started at Plaza Infiniti in September 1991 through November 1992, she received no criticisms of her method of selling automobiles. (T. 3:83). Before making her complaint of discrimination, Feltmann was complimented on numerous occasions by Rich, Tony Pandjiris (the general manager), and John Capps (the president) as well as customers, for having done a good job and having high Customer Satisfaction Index ("CSI") scores, including the highest at Plaza Infiniti. (T. 3:77-70, 83, 90-91, 121-122; 6:3-4). Also, Feltmann was recognized as a top Infiniti sales consultant in the United States. (T. 3:90, 150). She was even named to the Infiniti Pinnacle Club, an elite national recognition program for high achievement in sales and customer satisfaction. (T. 3:148). None of the other male sales consultants received such a memo (T. 2:79-80), even though Feltmann ranked above half of the male sales consultants at Plaza Infiniti in terms of the number of new and used cars sold for the entire year of 1992 and had the highest sales in December 1992. (T. 3:120-122).

A few days prior to receiving the January 4, 1993, memo from Rich, Feltmann's co-worker, Barnstead, told her that she polarized herself from the rest of the sales department and management because of the complaint she made in November concerning the sexual harassment by Anzalone, and was going to have a thick personnel file. (T. 3:140-141). After Barnstead's comment, Feltmann began receiving criticisms without basis that no other male sales consultants received. (T. 3:142). None of the male sales consultants, with the exception of Buetel's single memo regarding probation, ever received any memos of reprimand. (T. 2:101-102, 250-251; 3:26; 6:127, 239).

D. Use Of Company Demonstrator.

On February 23, 1993, Feltmann, and no male sales consultant, was given a memo from Rich restricting her use of the demonstrator to only the City of St. Louis and St. Louis County, not just the St. Louis area. (T. 3:106). However, the other male sales consultants drove their demonstrators out of the St. Louis area without permission and did not receive reprimands. (T. 2:74, 255-256; 3:25-26, 102-106; 6:141).

E. Guest Drives.

On April 9, 1993, Rich issued a memo requiring that he give permission for guest drives, whereby the customer is allowed to take the automobile for an extended length of time, and that the cars be logged out. (T. 3:73, 162-163). After the April 9th memo, Feltmann was never granted permission to overnight guest drive any automobile while Rich gave the male sales consultants such permission on numerous occasions. (T. 2:146-148; 3:165, 255; 6:31, 34-37, and 94-99). The guest log indicates that there were a number of overnight guest drives by other sales consultants after the April 9th memo. (T. 6:33-38). Furthermore, male sales consultants were not reprimanded for not logging cars out. (T. 2:155; 3:185-187).

Capps testified that, although there was a requirement to get Rich's permission to guest drive, if Rich was absent, one could guest drive and then talk with Rich after the fact. On two occasions, when management was unavailable, Feltmann allowed guest drives. (T. 3:198-200). On May 17, 1993, after discussing the matter with Jim Schlabach (the assistant manager) (T. 6:100), Rich fired Feltmann. (T. 3:201; 4:154). No Plaza Infiniti employee had ever been terminated or disciplined for failing to log out a guest drive or for allowing guest drives of automobiles without permission. (T. 3:200).

F. Loaning Of Cars To Customers During Snowstorm.

In February 1993, there was a snow storm and Feltmann loaned out two of the smaller model Infiniti automobiles to previous customers who could not drive their larger Infiniti cars in the snow because of poor traction. (T. 3:143, 145-146). Company policy encouraged the sales consultant to try to handle customer complaints. (T. 2:60-61; 4:10). However, Feltmann received a memo from Rich reprimanding her for the incident. (T. 3:147). Rich was shown at trial to have lied about the incident. (T. 2:90-93).

G. Rich's Refusal To Allow Feltmann To Drive Front Wheel Drive Vehicle During Snowstorm While Granting Permission To Males.

In February 1993, Rich allowed two male sales consultants to drive home different Infiniti models that were front wheel drive because of the snow, but would not allow Feltmann to do the same, so she was required to use a rear wheel drive vehicle. (T. 2:93-94). Feltmann was the only sales consultant to show up for work the next day in the snowy weather. (T. 2:94-95). Moreover, when she arrived at work, Rich told Feltmann to go home and when she remained at work, he indicated it was a violation of policy. (T. 2:95-96). However, when Rich left work early, Pandjiris called Rich and ordered him to get back to work. (T. 2:95-96).

H. Probationary Notice To Feltmann In March 1993.

In March 1993, Feltmann received another memo from Rich, placing her and Buetel on probation. (T. 2:249; 3:151). Another male consultant, Jones, was not placed

on probation, even though Jones sold less cars the prior two months, the prior year, and had lower CSI scores. As to gross profits, Brenner's and Jones' average gross profit figures were not dissimilar to Feltmann's, but neither received any memos or reprimands concerning their low gross profits. (T. 6:240). The memo stated that if she did not achieve the goals indicated to the Plaza Infiniti sales force, she would be terminated. (T. 3:152). In March, she sold eleven new Infiniti automobiles, whereas Jones only sold two and Buetel only sold five. (T. 3:154). Barnstead and Brenner sold fourteen and nine cars respectfully. (T. 3:154). Feltmann's average CSI score for the quarter through March of 1993 was 99.3 percent and her monthly average score for March was 100 percent; both scores were the highest among the Plaza Infiniti sales consultants. (T. 3:155-156).

I. Regional Walk Around.

In March 1993, Feltmann asked Rich to be allowed to participate in the regional walk around competition in Chicago, but Rich refused to allow her to do so while he gave Mike Barnstead and Scott Brenner the opportunity to go, and both declined. (T. 2:106, 206-208, 236-237; 3:156-158).

J. Feltmann Was The Only Salesperson Required To Pay For Brochures.

In April 1993, Rich required Feltmann to personally pay for Q45 sales brochures for her customers while none of the male sales consultants were required to do so. (T. 2:134-135; 3:192-194).

K. Other Instances Of Discrimination And Retaliation.

There were numerous incidents in which Feltmann was treated differently than her male co-workers after November 1992, including the following, which occurred just weeks prior to her termination:

1) *Rich Switching Sale With Male So Feltmann Received Less Commission.* In April 1993, Feltmann received a house deal that would have earned a substantial commission, but Rich switched the deal with Barnstead's house deal, resulting in Feltmann receiving a lower commission. (T. 3:181-182).

2) *Rich Approved Sales With Less Gross Profit For Males.* On April 15, 1993, Rich approved a deal for Brenner with a lower gross profit than a deal he refused to approve for Feltmann just days before. (T. 2:160-162).

3) *Assistant Manager Would Not Approve Customary Tire Switch.* On May 11, 1993, Feltmann could not get Schlabach to approve a switch of tires on a car she sold, even though it was done in the past, and therefore, she had to personally pay for a nearby gas station to perform the work. (T. 2:156; 3:188-191).

4) *Not Getting Off Telephone For Feltmann To Sign Orders But Doing So For Males.* Rich would not get off the phone to sign service department requests for Feltmann, but would do so for the male sales consultants. (T. 4:16, 19).

5) *Feltmann Was Replaced By A Male Sales Consultant.* After Feltmann was fired, she was replaced by a male sales consultant. (T. 5:46).

L. Fraud By Feltmann's Managers In Summer Momentum Program.

During the summer of 1992, Sieben participated in a sales incentive program run by the manufacturer entitled "The Summer Momentum Program" whereby sales consultants received monetary bonuses directly from the manufacturer. (T. 2:106; 3:107-108).

A separate bank account, in Rich's and Schlabach's names, was established to handle all bonus money. (T. 2:128-129, 3:238; 3:108-109). Rich falsified reports to the manufacturer by listing fictitious purchasers on the manufacturer reports to obtain additional bonuses. (T. 3:13-17; 4:185-186).

In early 1993, Feltmann received her 1099 tax form for 1992 from the manufacturer and it reflected $3,400.-00 as additional income from the Summer Momentum Program, and this additional amount was not paid to her, nor could she account for it. (T. 3:165-168). In February 1993, Feltmann told Schlabach that her 1099 was inaccurate and she continuously asked him where the extra money went, how much money the separate bank account contained, and what Schlabach planned for the extra money. (T. 3:167, 169-170). Upon investigation, Feltmann discovered a number of checks made out to her that she never received and on which her name was forged. (T. 3:178-180). She complained to Rich that her 1099 was inaccurate and that her checks were forged. (T. 2:119-120; 3:171). Rich admitted to Feltmann that he signed her name to some of the checks. (T. 3:175).

On April 14, 1993, the day before her taxes were due, upon request, Feltmann finally received a check to cover

her additional tax liability. (T. 3:176-177). However, before she could receive this check, Feltmann was required to sign a release. (T. 2:122-123; 3:177-178). Around the time Feltmann spoke to Rich about this situation, Schlabach was telling Rich that Feltmann should be disciplined or terminated. (T. 2:130-131).

Subsequent to Feltmann's termination, Schlabach left Sieben, Inc., after it was discovered that money was embezzled from the separate bank account and other sources. (T. 6:269-270). Schlabach was never prosecuted for embezzling. (T. 6:270). Moreover, Rich was never disciplined or reprimanded for his handling of the Summer Momentum Program separate bank account.

M. Rich Was Totally Discredited At Trial.

In reaching its decision in this case, the Eighth Circuit heavily relied on the testimony of Rich, even when contradicting evidence existed. Rich was seriously discredited at trial. For instance, Rich's main thrust in his campaign against Feltmann was that she was not selling cars, was doing a poor presentation, and was inappropriately relying on guest drives. (T. 2:226). Yet, when asked to name any customer that Feltmann gave a poor presentation to, Rich could only name one – Dr. Bayla Meyer. (T. 2:226; 3:225). However, the general manager, Pandjiris, received a note complimenting Feltmann's sales performance with Dr. Bayla Meyer! (T. 3:225-226; 5:36-37). Moreover, Rich testified that the "work ethic" memo, dated January 4, 1993, was written because he was not seeing any improvement in December after slow production in October and November. (T. 2:81-83). Rich testified that Feltmann was at the bottom of all salespersons in sales for December when, in fact, no one sold more cars than Feltmann that month. (T. 2:81-

83). Feltmann was a leader in CSI scores for the entire sales force for the majority of her employment at Plaza Motors (T. 3:205), yet for the partial month of May 1993, Rich wrote on the May report that she was below dealership average, by .4 of a point, while the same report indicated that she was ahead of both dealer and regional totals for the quarter and year to date. (T. 3:163-167). Similarly, Rich testified at trial that the separate bank account for bonus checks was not his idea, but stated to the contrary in deposition. (T. 2:108-209). Also, Rich has been fired from every previous automobile job and was later relieved of his position at Plaza Motors. (T. 2:41-45; 5:128). Moreover, Rich knew how to discriminate without overtly saying or doing so since his wife was a human resource manager. (T. 6:102).

N. Feltmann's Claims For Sexual Discrimination.

Feltmann elicited substantial evidence of sex discrimination. The Eighth Circuit, in its opinion, failed to give any inferences to Feltmann, and took upon itself the duty to reweigh the evidence and determine the credibility of witnesses. For instance, the Eighth Circuit concluded that no discrimination existed when Feltmann was placed on probation with Buetel. However, there was nothing that Rich could do to Feltmann at that point since she sold twice as many cars as Buetel, and more than any other male sales person except one. Thereafter, one of the most effective sales tools, guest drives, was taken away from Feltmann, under the pretense that permission would be required of all sales persons.

It is clear from the record that sufficient evidence existed to allow a jury to determine the ultimate fact of intentional discrimination since a reasonable juror could return a verdict for Feltmann based on the evidence.

Ryther, 108 F.3d at 835 (citing *Gardner v. Buerger,* 82 F.3d 248, 251 (8th Cir. 1996)).

O. Feltmann's Claims For Retaliation.

The evidence clearly showed that, after Feltmann made a harassment complaint, she was continually bombarded with memoranda of criticisms of her performance and threats of termination, until she was ultimately terminated. As the Eighth Circuit indicated in *Ryther,* it is difficult to show exactly the thought process of an employer who discriminates. *Ryther,* 108 F.3d at 848, n.6. Feltmann clearly made a prima facie case of retaliation in that 1) she complained of discrimination, 2) adverse action was taken against her, and 3) the adverse action was causally linked to the complaint of discrimination. *Marzec v. Marsch,* 990 F.2d 393, 395 (8th Cir. 1993).

In reversing the lower court, the court of appeals stated that the "termination six months after an incident is by itself insufficient to support a claim of causal connection." *See* Appendix A, p. 12a. What the court failed to note is that the record was replete with evidence that retaliatory actions were taken by Sieben, Inc. during the six month period following her complaint. Until Feltmann lodged her complaint against Anzalone, she never received criticisms relating to her performance. Again, as in Feltmann's discrimination claims, the Eighth Circuit seemed to require "direct" evidence of retaliation when retaliation can be shown through "indirect" or circumstantial evidence. *Jackson v. Delta Special Sch. Dist.,* 86 F.3d 1489, 1494 (8th Cir. 1996). Since sufficient evidence of causation was shown, any inferences of retaliation should be left to the jury. *Ryther,* 108 F.3d at 835.

P. Feltmann's Claim For Wrongful Discharge.

Feltmann clearly made a prima facie showing of wrongful discharge. *Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548, 549 (8th Cir. 1993). From the time that Feltmann received her 1099 in late January or early February 1993, she was asking Schlabach and Rich the source of the extra income and, when she did not receive answers, she investigated and uncovered that Rich falsified reports to the manufacturer and forged her name. A clear inference can be drawn that Rich and Schlabach were trying to hide their fraud and firing Feltmann would be essential since she was the one with the most knowledge of their actions. Again, the Eighth Circuit wrongfully required "direct" evidence when proof of a causal connection in a wrongful discharge action can be established by indirect or circumstantial evidence. *Olinger v. General Heating and Cooling Co.*, 896 S.W.2d 43, 47 (Mo. App. 1994).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES E. REIS, IV
T. MICHAEL WARD
MICHELE L. LARISSEY

BROWN & JAMES, P.C.
705 Olive Street
Suite 1100
St. Louis, Missouri 63101
(314) 421-3400
Counsel for Petitioner.

September 16, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-4058

Judith A. Feltmann,

Appellee,

v.

Sieben, doing business as
Plaza Motors Company, Inc.,

Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: June 12, 1996

Filed: March 20, 1997

Before WOLLMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and ROSENBAUM,[1] District Judge.

WOLLMAN, Circuit Judge.

Sieben, Inc. (Sieben) appeals from the judgment entered against it in Judith A. Feltmann's action alleging sex discrimination and retaliatory discharge under the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e

---

[1]The HONORABLE JAMES M. ROSENBAUM, United States District Judge for the District of Minnesota, sitting by designation.

et seq. (Title VII), the Missouri Human Rights Act, Mo. Rev. Stat. §213.010 et seq. (MHRA), and Missouri common law. We reverse.

I.

Plaza Infiniti is one of eight automobile franchises owned and operated by Sieben and housed at Sieben's Plaza Motor Company (Plaza). Bob Rich, then sales manager at Plaza Infiniti hired Feltmann as a sales consultant in September of 1991. Feltmann was the only female consultant at any of the Plaza franchises. During 1992, Feltmann's only full year at Plaza, Infiniti executives named her to the Pinnacle Club, an elite group of consultants recognized for high sales and consumer satisfaction.

In the summer of 1992, Infiniti instituted an incentive program that awarded consultants bonuses for each car sold. Overall sales were high, and Rich had little time to evaluate the consultants' selling methods. When overall sales began to decline after the incentive program ended, Rich felt pressured to increase sales and began evaluating consultants and requesting them to increase sales. Feltmann's sales declined after the incentive program, but she was still above half of all consultants for 1992 and, in December, tied with another consultant for the most sales that month. Feltmann's average gross profit for December of 1992, however, as well as January through April of 1993, was the lowest of all consultants. Rich testified that Feltmann's low profits on each car resulted from her failure to thoroughly explain the cars' features, a sales tactic that results in a higher selling price.

In November 1992, Feltmann's co-worker Mike Barnstead told her that Gordon Anzalone, a Sieben employee

who worked at a different franchise, had called her an extremely vulgar name. Feltmann wrote a letter to Rich the next day about the comment, and Rich reported the incident to Tony Pandjiris, the manager of Plaza Motors. Feltmann ultimately met with John and Tom Capps, Sieben's owners, who told Feltmann to report any future incidents. They also asked her if she wanted Anzalone fired, but Feltmann said she did not. They reprimanded Anzalone and told him that if anything like that happened again he would be terminated. Feltmann never heard of any other vulgar comments about her. In early January, however, Barnstead told Feltmann that she had polarized herself from the rest of the sales department and was going to have a thick personnel file. Feltmann assumed that this comment related to her complaint about Anzalone.

On January 4, 1993, Rich sent Feltmann a personal memo regarding her "work ethic." Rich's memo indicated he was unhappy with her mthod of selling. She was allowing "guest drives" – permitting prospective buyers to take an Infiniti for a short period of time without an accompanying consultant – too often and too soon in the selling process. Rich also thought she was not a "team player" and did not work well with other Plaza employees.

In March 1993, Rich placed Feltmann and another consultant, Rich Beutel, on probation because of their low sales performance in January and February of 1993. Feltmann and Beutel consequently rebounded by the end of March, and Feltmann sold more automobiles that month than all but one other consultant. Despite her high March sales, Feltmann was not allowed to participate in a sales competition in Chicago. Rich had offered the opportunity to participate to the two top

consultants at Plaza Infiniti. When they declined he did not offer the opportunity to Feltmann or to any of several male consultants who wanted to go.

Plaza Infiniti consultants were able to lease, at a low rate, a "demo" Infiniti for personal use. Following the drop in sales after the incentive program, Rich became concerned about costs at the dealership and restricted consultants' use of demo cars to the St. Louis area. Despite this restriction, Feltmann continued her weekly 300-mile round trips to Marion, Illinois, to visit her husband. On February 23, 1993, Rich sent Feltmann a personal memo reiterating that her use of her demo was restricted to the St. Louis area. No males received such a memo, even though Feltmann contends that they took their cars out of the St. Louis area occasionally. Feltmann continued to take her demo to Marion weekly until April 1993, two months after she received the personal memo from Rich and six months after the first restriction.

In January or February of 1993, Feltmann received her federal 1099 tax form, which included bonuses attributed to her from the summer 1992 incentive program. Her 1099 indicated more bonus income than she had actually earned. Casey Jones's and Beutel's 1099s also indicated larger bonuses than they had actually earned. Feltmann obtained copies of the checks addressed to her and discovered that someone had forged her signature for endorsement. The forgeries resulted from the system Plaza Infiniti used to handle consultants' bonus checks. Pandjiris would sign the consultants' checks, deposit them in a group account, and then issue the consultant a check on that account. Some consultants had given Rich and Pandjiris authority to sign their checks if the checks arrived in their absence. Although

Feltmann had not given her managers such authority, they signed her name anyway. Feltmann also discovered that she had been credited with sales she did not actually make. Feltmann complained to Rich that her 1099 showed income in excess of what she actually earned. On April 14, 1993, Sieben gave Feltmann a check covering her additional tax liability, but required her to sign a release stating that she held Plaza harmless for any claims relating to the incentive program. Sieben eventually discovered that Jim Schlabach, who had been in charge of the account, had been taking money from it, and terminated him.

Prior to April 9, 1993, Plaza Infiniti's guest drive policy provided that consultants were to use their "best judgment" in permitting a customer to guest drive a car. Feltmann allowed many more guest drives than any other consultant: Sieben's guest drive log reveals that between July of 1992 and April of 1993 she permitted 107, while the highest male consultant permitted forty-eight. In February of 1993, Rich reprimanded Feltmann when she loaned two small Infinitis to Infiniti owners who did not want to drive their own cars in a snowstorm.

On April 9, 1993, Rich announced a new guest drive policy. Consultants were not to loan out any cars without Rich's permission or without logging the cars in the guest drive log book. Overnight guest drives would no longer be permitted, and consultants had to accompany their guests. Before Rich left for a trip the weekend of May 15, he reiterated that no guests could drive the new Q45 without an accompanying consultant. Despite the April 9, memo and Rich's specific instruction, however, Feltmann permitted a customer to take a Q45 alone, and allowed another customer to keep a J30 model for the entire weekend, without getting permission or noting the guest drive in the log book.

The following Monday, May 17, 1993, Rich fired Feltmann because she had allowed these guest drives contrary to his specific instructions. Feltmann requested a meeting to review her discharge. She then met with Rich, Pandjiris, and John and Tom Capps and alleged that she had been discriminated and retaliated against. The Capps told her that they took her allegations very seriously and would investigate her complaints. Ultimately, the Capps found no merit in her allegations. John Capps, however, considered Feltmann a "salvageable employee" and had Pandjiris extend an offer of reinstatement to her. Feltman declined the offer, however, because Tom Capps refused her demand that he fire four male sales consultants, did not accord her complaints any merit, and would make no changes at the showroom. She also refused a position in another Sieben showroom. Feltmann subsequently worked at Lexus of St. Louis for ten months and then at St. Louis Acura for four months, until major depression, allegedly precipitated by her discharge from Plaza, forced her to quit.

After exhausting her administrative appeals, Feltmann brought this action alleging sex discrimination in violation of Title VII and the MHRA; retaliatory discharge in violation of Title VII and the MHRA; and retaliatory discharge under Missouri common law for reporting the forged checks. The jury found in favor of Feltmann and awarded her $112,661 in back pay, $20,072.24 in compensatory damages, and $25,000 in punitive damages on her Title VII sex discrimination claim. Sieben filed a motion for judgment as a matter of law (JAML) or, in the alternative, for a new trial or remittitur. The district court denied the motion and awarded Feltmann front pay of $72,668.38 for a two year period, together with costs and attorneys' fees.

II.

Sieben contends that the district court erred in failing to grant Sieben's motion for JAML on Feltmann's discrimination claims, both because Feltmann failed to establish her prima facie case and because she failed to introduce evidence sufficient to support a finding of discrimination.

We review de novo a district court's denial of a motion for JAML, applying the same standard used by that court. *See Triton Corp. v. Hardrives, Inc.*, 85 F.3d 343, 345 (8th Cir. 1996). We must consider the evidence in the light most favorable to Feltmann, assume that all conflicts were resolved in her favor, give her the benefit of all reasonable inferences, and then deny the motion for JAML if reasonable persons could differ regarding the conclusions to be drawn from that evidence. *See, e.g., Ryther v. Kare 11,* No. 94-3622, slip op. at 25-26 (8th Cir. Mar. 6, 1997) (en banc); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1056 (8th Cir. 1993).

In a discrimination case, the plaintiff bears the initial burden of establishing a prima facie case, which gives rise to a presumption of unlawful discrimination. *See Ryther,* slip. op. at 6. Once the plaintiff establishes the prime facie case, the burden shifts to the employer to produce evidence that its complained-of action was based on a legitimate, nondiscriminatory reason. *See id.* Upon the employer's satisfactory production of such evidence, the presumption of discrimination drops out, and the only remaining issue is the ultimate question of whether the employer intentionally discriminated against the plaintiff. *See id.*

When reviewing the denial of a motion for JAML on a discrimination claim, however, we need not "re-engage

in the [prima-facie step] analysis . . ., but instead limit our review to the ultimate factual issue of whether [the defendant] intentionally discriminated on the basis of [the plaintiff's] sex." *Karcher v. Emerson Elec. Co.*, 94 F.3d 502, 507 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3587 (Feb. 5, 1997); *see also Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095, 1101 (8th Cir. 1996); *Parrish v. Immanuel Med. Ctr.*, 92 F.3d 727, 733 (8th Cir. 1996); *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 800-01 (8th Cir. 1994). Thus, we must determine whether Feltmann adduced evidence " 'capable of proving that the real reason for h[er] termination was discrimination based on [gender].' " *Nelson v. J.C. Penney Co., Inc.*, 75 F.3d 343, 345 (8th Cir.) (quoting *Boatmen's Bancshares*, 26 F.3d at 801), *cert. denied*, 117 S.Ct. 61 (1996). Feltmann was required to produce evidence of conduct or statements by persons involved in Sieben's decision-making process reflective of a discriminatory attitude sufficient to allow a reasonable jury to infer that that attitude was a motivating factor in Sieben's decision to fire Feltmann. *See J.C. Penney*, 75 F.3d at 345; *Kehoe*, 96 F.3d at 1102; *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 174 (8th Cir. 1992). "We do not sit to determine if this reason is based on sound principles of business judgment . . . . Rather, the relevant inquiry is whether [Sieben's] decision was based on [gender]." *Lidge-Myrtil v. Deere & Co.*, 49 F.3d 1308, 1312 (8th Cir. 1995). Giving Feltmann the benefit of all reasonable inferences, we find no conduct or statements by persons involved in Sieben's decision to fire Feltmann from which a jury could reasonably infer that a discriminatory attitude was a motivating factor in Sieben's decision to discharge Feltmann.

Feltmann claims that she was treated differently from similarly situated male consultants, an allegation which, if established by evidence, would support a finding of sex discrimination. *See Kientzy,* 990 F.2d at 1060. The litany of incidents Feltmann recites, however, fails to support an inference of disparate treatment. Although Feltmann alone received a memo regarding her work ethic, Rich also talked to a male consultant about his work ethic, and Feltmann does not offer evidence of any other consultants whose work ethic Rich questioned but did not reprimand. Similarly, the fact that Rich put Feltmann on probation does not show discriminatory treatment, since Rich also put Feltmann's male coworker Casey Jones on probation for the same reason – declining sales in January and February 1993. Feltmann's contention that she was never given permission to allow a guest drive after April 9, 1993, though male consultants were, is also unconvincing. Feltmann could only specify one instance when Rich denied her permission after April 9, and he denied permission to at least two male consultants as well. Similarly, Feltmann's allegation that she was fired for not logging out two cars but that males who failed to log cars out were not reprimanded is unpersuasive. Feltmann was fired in part because she failed to ask permission, yet she admitted that she knew of no instance when a male consultant allowed a guest drive without getting permission. Thus, even though these male consultants may have been treated differently, they "cannot be considered similarly situated." *Johnson v. Baptist Medical Center,* 97 F.3d 1070, 1073 (8th Cir. 1996). In addition, Rich believed, and Feltmann admitted, that by not logging cars out or asking for permission, Feltmann was attempting to hide her actions from Rich.

Feltmann's other examples of disparate treatment are without merit. Her allegation that Rich swapped one of

her "house deals" (a deal brought in by a non-consultant and assigned to a consultant) with a less-profitable deal originally assigned to a male loses force when we consider that Feltmann, and no other consultant, had been given forty-one clients belonging to a consultant who left Plaza. Likewise, her claim that she was forced to drive her rear-wheel-drive Q45 in a snowstorm while the males could drive front-wheel-drive G20s is weakened by the fact that the male consultants asked for permission, but Feltmann did not. The fact that Rich sent Feltmann a personal memo reprimanding her for violating his November demo car memo, while males were not reprimanded, is similarly unhelpful; Feltmann drove her demo 300 miles every weekend until April of 1993, while the males' use was occasional at most and chiefly took place prior to Rich's November 1992 memo. Feltmann's claim that Rich refused to switch tires on a car Feltmann sold, although it "had been done in the past," proves nothing. Rich explained that he would no longer switch tires for anyone because tires are federally registered with a particular automobile and switching them created problems. Feltmann's claim that she, and no males, had to pay for the new, expensive Q45 brochures is likewise not persuasive; Feltmann was the only person who expressed a desire to furnish her customers with personal brochures, and she failed to prove that male consultants were given free brochures. Finally, with regard to Feltmann's allegation that Rich did not allow her to participate in the sales competition in Chicago, we note that the two men Rich wanted to send were Plaza's "two best salespeople," and he did not give the opportunity to any of several male consultants who wanted to participate in the competition.

Feltmann claims that Rich approved one male consultant's deal that yielded a lower profit than one of her deals that Rich denied. She also claims that Rich would not get off the phone to sign service orders for her, although he would for male consultants. Because she failed to introduce any specific evidence to substantiate these vague and conclusory claims, however, they are insufficient to support a claim of disparate treatment. *See Lidge-Myrtil,* 49 F.3d at 1311-12; *Davenport v. Riverview Gardens Sch. Dist.,* 30 F.3d 940, 945 (8th Cir. 1994).

We recognize that a jury may discredit or disbelieve whatever alleged facts are inconsistent with its conclusion, including the employer's proffered reason for the plaintiff's discharge, as long as evidence supports the jury's verdict. *See Lavender v. Kurn,* 327 U.S. 645, 653 (1946), *quoted in Ryther,* slip op. at 27. As this statement presupposes, however, sufficient evidence must still exist to form a basis upon which a reasonable jury could rest its conclusion that the employer's decision stemmed from intentional discrimination. *See Ryther,* slip. op. at 8-10, 25. Because there was an absence of such evidence, the district court should have granted Sieben's motion for JAML on Feltmann's discrimination claims.

III.

Sieben next asserts that Feltmann failed to establish a prima facie case that she was retaliated against for reporting Anzalone's profane, harassing comment. To establish a prima facie case of retaliation, Feltmann must show that she complained of the harassing comment, that Sieben took adverse action against her, and that the adverse action was causally linked to her complaint. *See Marzec v. Marsh,* 990 F.2d 393, 396 (8th Cir. 1993).

We conclude that Feltmann failed to establish the necessary connection between her report and her discharge. Anzalone had no input into Sieben's termination decisions and worked at a different franchise on the Plaza Motors premises. The only evidence of retaliation Feltmann offered was Barnstead's comment that Feltmann had "polarized" herself from the rest of the salespeople and that she was going to have a "thick" personnel file. Barnstead, however, had no input into Sieben's firing decisions, and Feltmann offered no evidence that Barnstead's remark even related to her report. Anzalone's and Barnstead's remarks are "insufficiently serious" to support an inference of Sieben's retaliatory intent. *See Johnson*, 97 F.3d at 1073. Feltmann also alleged that her coworkers treated her "unfairly" and that her managers "singled her out." Such conclusory and unsubstantiated allegations, however, fail to support Feltmann's claim of retaliation. *See Davenport*, 30 F.3d at 945.

Furthermore, Rich, who ultimately discharged Feltmann, was concerned about Anzalone's comment and was principally responsible for bringing it to the Capps' attention. Similarly, the Capps' concern in dealing with the incident suggests, if anything, that Sieben was willing to confront and rectify Feltmann's harassment claims. Feltmann herself admitted that her complaint was handled efficiently and to her satisfaction. Finally, Rich did not discharge Feltmann until six months after she reported Anzalone's comment. The fact of termination six months after an incident is by itself insufficient to support a claim of causal connection. *See Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992). Because Feltmann failed to adduce any evidence capable of proving a causal connection between her report and discharge, the district court erred in not granting JAML, on this count of Feltmann's complaint.

IV.

We conclude that the same failure of proof exists with respect to Feltmann's allegation that she was fired for reporting the problems with the incentive bonus account. Sieben terminated Schlabach upon discovering that he had been taking money from the bonus account, which suggests that Sieben was not trying to protect itself or Schlabach. Moreover, Schlabach was not Feltmann's superior and was not involved in the decision to fire Feltmann. Although Feltmann notes that Rich discharged her six weeks after the complaint, mere temporal proximity is insufficient to link Feltmann's report to her discharge. *See J.C. Penney*, 75 F.3d at 346-47 (plaintiff fired a month after he filed age discrimination charge failed to establish causal link without evidence in addition to temporal proximity); *Caudill v. Farmland Indus., Inc.*, 919 F.2d 83, 86-87 (8th Cir. 1990) (close proximity between plaintiff's filing of charges and plaintiff's discharge was a mere "slender reed of evidence"; any conclusion of temporal proximity would be "rank speculation"). Accordingly, the district court should have granted Sieben's motion for JAML on this count.

V.

Because Feltmann's claims find no support in the evidence, her claim for punitive damages must perforce also fail.

The judgment is reversed, and the case is remanded to the district court with directions to enter judgment in favor of Sieben, Inc.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-4058EMSL

Judith A. Feltmann,

Appellee,

vs.

Sieben, doing business as
Plaza Motors Company, Inc.,

Appellant.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Chief Judge Richard S. Arnold, Judge McMillian, and Judge Murphy would grant the suggestion. The petition for rehearing by the panel is also denied.

June 18, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

[Filed May 16 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Case Number: 4:94CV562 SNL

JUDITH A. FELTMANN,

Plaintiff,

v.

SIEBEN, INCORPORATED,

Defendant.

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff, Judith A. Feltmann recover of defendant Sieben, Incorporated, compensatory damages in the amount of One Hundred Thirty Two Thousand Seven Hundred Thirty Three and Twenty Four Cends ($132,733.24) with interest at the rate of 6.28% from the date of this judgment.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Judith A. Feltmann recover of defendant, Sieben, Incorporated punitive damages in the amount of Twenty Five Thousand Dollars ($25,000.00) with interest at the rate of 6.28% from the date of this judgment.

IT IS FINALLY ORDERED AND ADJUDGED that defendant Sieben, Incorporated shall bear the costs of this action.

/s/ Stephen N. Limbaugh
STEPHEN N. LIMBAUGH
UNITED STATES DISTRICT JUDGE

Dated this 16TH day of May 1995.

APPENDIX D

[Filed Nov 16 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94 CV 562 SNL

JUDITH A. FELTMAN,

Plaintiff,

vs.

SIEBEN INC. d/b/a PLAZA MOTORS,

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on several post-trial matters. The Defendant has filed motions for Judgment as a Matter of Law (101), For a New Trial (101), To Alter or Amend the Judgment (101), to Strike an Affidavit (106) and for a Hearing Regarding the Details of Reinstatement (109). The Plaintiff has filed a Motion for Front Pay (105) and for Attorney Fees (127). The Court will address the issues of altering the judgment, the supplemental affidavit, the Plaintiff's equitable remedy, and the Plaintiff's costs and attorney fees in that order.

The Defendant's motions for altering the judgment and new trial are denied. The Court's record developed during the trial and during the instruction conference fully set out the Court's position and require no further discussion because the briefs do not present any significant new arguments.

The Defendant's motion to strike the supplemental affidavit is also denied. Although the affidavit is not necessary because the Court had already made the decision that the witness was unavailable to testify in accordance with Fed.R.Evid. 804(a); its inclusion had no effect on that decision.

The next issue is the question of the Plaintiff's equitable remedy. The Plaintiff may seek front pay or reinstatement. Although reinstatement may be encouraged, the facts of this case make front pay preferable. The animosity that has developed between the parties as a result of the previous working conditions and the confrontational nature of the trial make reinstatement impossible.

The only question that remains is the amount of front pay. The Plaintiff has only asked for two years salary to allow her to develop a customer base that would be equivalent to the base she had at her position with the Defendant.

The Plaintiff has put forth a dollar amount and the Defendant challenges it. The Defendant's challenge comes in the form of comparisons to other sales consultants at other dealerships. The Defendant's analysis is flawed because, as the Defendant vigorously argued during the trial, the operations of the Defendant's other dealerships have no bearing on this case. The issues in this case are narrowly defined to relate solely to the operation of the Infinity dealership.

The award of front pay is intended to compensate the Plaintiff for the illegal actions of Sieben Inc. The amount and duration of that amount is left to the discretion of this Court. The only limit on the Court's discretion is that the Court avoid speculation. In order to avoid speculation, the Court will base the dollar amount on the

findings of the jury and the Plaintiff's ability to mitigate her damages. Based on a two year mitigation of eighty thousand dollars ($80,000) from a two year damage award of one hundred fifty two thousand six hundred sixty eight and 38 cents ($152,668.38) the Court finds that seventy two thousand six hundred sixty eight and thirty eight cents ($72,668.38) is the appropriate amount of front pay.

The next issue is the question of costs that were incurred by the Plaintiff in the litigation of this matter. The Court is willing to allow taxing of the majority of the costs, but it will not allow taxing for exhibits which were not used at trial nor will it allow taxing for special process servers. Some circuits have reasoned that since Fed.R.Civ.P. 4(c) contemplates private process servers, the statute naturally includes them. *See, Alflex Corporation v. Underwriters Laboratories, Inc.*, 914 F.2d 175, 178 n.6 (9th Cir. 1990); *Griffith v. Mt. Carmel Medical Center*, 157 F.R.D. 499 (D.Kan. 1994); however the eight circuit maintains that special process servers are not mentioned in §1920 so they cannot be taxed. *Crues v. KFC Corp.*, 768 F.2d 230, 234 (8th Cir. 1985). Accordingly, the Court will reduce the costs by four hundred eighty three dollars and twenty cents ($483.20) for the use of special process servers. The Court finds that the rest of the Plaintiff's costs, including the supplemental costs, are well founded and appropriately documented. Accordingly the Court awards and the Clerk will tax fourteen thousand two hundred fifty one dollars and eighty seven cents ($14,251.87).

Finally, the Court will turn to the question of fees. As a prevailing party, the Plaintiff is entitled to recover reasonable fees under Title VII and §213.111 R.S.Mo. There is no question that the Plaintiff was the prevailing

party as the jury returned a verdict in her favor on all counts. The only question raised by the Defendant is the reasonableness of the fee.

The specific objections raised by the Defendant include the loadstar figures for Mr. Reis' counsel, paralegal fees, court time, and work done that related to the Plaintiff's husband. The Court finds that the fees charged by Mr. Reis and his cocounsel, all of which are under one hundred and fifty dollars an hour ($150.00), are reasonable amounts for this type of work in the St. Louis legal community.

The paralegal fees are also reasonable. The Court encourages the use of less expensive assistants to perform basic tasks necessary to the proper litigation of claims. The objection to court time for Mr. Reis' associate is also rejected. The Court takes note of her academic performance but bases its decision on her active role in the trial, not her transcript.

Finally, the Court dismisses the Defendant's objection to the Plaintiff's inclusion of time spent on the Stuart Ziglin matter. The Defendant's strategy to attempt to include extraneous information about the Plaintiff's husband's criminal record was an issue that the Plaintiff had to address as a part of her case and does not constitute unrelated legal work that was done for the benefit of the Mr. Ziglin.

The four volume file speaks to the effort expended by both counsel to represent their clients in what they viewed as an appropriate manner. The chosen style of representation led to the filing of a variety of pleadings and numerous appearances before the Court. The seven post trial motions filed by the parties and the additional six pleadings that relate solely to the issue of costs are examples of that chosen style.

The Court addresses the numerous pleadings and their voluminous nature because that has a direct effect on this Court's view of the reasonableness of the Plaintiff's fee. The Court finds that the legal questions presented were not of an unusually complex nature; however, the position put forth by the Defendant and the inability of counsel to work together as professionals made the underlying facts difficult to discover and necessitated constant intervention by the Court.

The Court approves the One hundred eighty thousand four hundred fifty seven dollar ($180,457) fee of counsel as reasonable, but cuts the fee by fifteen percent to account for the unwieldy nature this case took on as a result of both counsel's inability to work together. Their actions led to unnecessary pleadings and appearances which cannot be borne as the burden of the client. Therefore, the Plaintiff is awarded one hundred fifty three thousand three hundred eighty eight dollars and forty five cents ($153,388.45).

Accordingly,

IT IS HEREBY ORDERED that the Defendant's Motions for Judgment as a Matter of Law (#101), Motion for a New Trial (#101), Motion to Alter or Amend the Judgment (#101), and for Motion to Strike the Supplemental Affidavit (#106) are DENIED.

IT IS FURTHER ORDERED that the Defendant's Motion for a Hearing (#109) is DENIED as moot as that hearing has already been held.

IT IS FURTHER ORDERED that the Plaintiff's Motion for Front Pay (#105) is GRANTED and she is awarded seventy two thousand six hundred sixty eight and thirty eight cents ($72.668.38) in front pay.

IT IS FURTHER ORDERED that the Plaintiff's Motion for Costs in GRANTED and she is awarded fourteen thousand two hundred fifty one dollars and eighty seven cents ($14,251.87) in costs.

IT IS FINALLY ORDERED that the Plaintiff's Motion for Attorney Fees is GRANTED and the Plaintiff is awarded one hundred fifty three thousand three hundred eighty eight dollars and forty five cents ($153,388.45).

Dated this 16th day of November, 1995.

/s/ Stephen N. Limbaugh
UNITED STATES DISTRICT JUDGE